

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 20, 2007

KRISTI KIMBRO v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2003-B-1571 J. Randall Wyatt, Jr., Judge

No. M2006-00554-CCA-R3-PC - Filed June 27, 2007

The petitioner, Kristi Kimbro, pled guilty to second degree murder and was sentenced to thirty-seven years imprisonment. She now appeals the denial of her petition for post-conviction relief, arguing that she received the ineffective assistance of counsel which caused her to enter an unknowing and involuntary plea. Following our review of the record and the parties' briefs, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and THOMAS T. WOODALL, J., joined.

Michael A. Colavecchio, Nashville, Tennessee, for the appellant, Kristi Kimbro.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Kathy Morante, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

In June 2003, the petitioner was indicted for first degree premeditated murder, felony murder, and robbery. A few months later, she pled guilty to second degree murder, a Class A felony, with an agreed Range II sentence of thirty-seven-years. The petitioner filed a pro se petition for post-conviction relief on October 1, 2004, and following the appointment of counsel, an amended petition was filed.

An evidentiary hearing was conducted on February 2, 2006. At the hearing, the petitioner's trial counsel, an assistant public defender, testified to his recollection of the evidence in the petitioner's case. According to counsel, the evidence showed that a witness saw the petitioner at the

victim's house on the night in question; the victim's purse was found in a trash can along with a knife; and when the petitioner was found in the victim's vehicle, she made a statement that she was not sure what happened but she remembered the knife. Counsel recalled there were photographs of the victim's house and medical reports indicating that the victim had been stabbed numerous times. Counsel said that in his opinion there was a lot of evidence against the petitioner, and he informed the petitioner of this evidence. Counsel did not recall telling the petitioner that "there was boxes and boxes of Discovery." Counsel stated that overall there "was not all that much" discovery in the petitioner's case. Counsel could not recall when he showed the petitioner the discovery, but he thought that it was shown to her when he received it.

Counsel testified that he had a hearing postponed to have the petitioner evaluated because he thought the petitioner had some mental health issues. Further, he obtained as many of her medical records as he could. He stated that the records were from Middle Tennessee Mental Health Institute (MTMHI), Madison Psychiatric Associates, Tennessee Christian, and a forensic evaluation from Vanderbilt. Counsel also spoke with Dr. Fakhruddin, a psychiatrist, who treated the petitioner until the week before the murder and received records from him. Counsel looked through his file and noted that he did not see any records from the Nashville Mental Health Co-op.

Counsel testified that he believed the petitioner received a plea offer because he presented the state with the petitioner's mental health history and because of his discussions regarding petitioner's mental state at the time. Counsel noted, however, that he had the petitioner evaluated and she was found competent to stand trial so he did not think she had an insanity defense. Counsel admitted that the petitioner's sentence of thirty-seven years was out of range. Counsel remembered telling the petitioner that the charge of felony murder carried a potential sentence of life, life without parole, or the death penalty. He also remembered that at one point early on, the prosecutor told him that the petitioner's case was a potential death penalty case because of the age of the victim; however, the state never filed a notice of intent to seek the death penalty.

On cross-examination, counsel stated that the state had open file discovery, and he reviewed the entire file. Counsel again recounted that he had questions about the petitioner's mental stability so he had her evaluated at Vanderbilt and she was found to be competent. Counsel said that he was aware the petitioner tried to commit suicide shortly after she was arrested, but before she was evaluated at Vanderbilt. Counsel testified that after looking at the petitioner's medical records and mental evaluation, he concluded that she had no potential insanity defense.

Counsel testified that the petitioner and the victim were neighbors, and the victim had helped the petitioner in the past. He stated that the victim was eighty-seven years old, and the autopsy report showed that the victim had twenty-six stab wounds. Counsel recalled that the victim admitted to the police that "she remembered going into some kind of rage, remembered something about a knife," but did not know that the victim had died. Counsel said that he asked the prosecutor to wait in deciding whether to seek the death penalty until he could get information on the petitioner's mental health. Counsel stated that he did not think the petitioner had any chance of being found not guilty if she went to trial, and he remembered explaining the evidence and law to the petitioner. According

to counsel, the petitioner understood her guilty plea perfectly. On re-direct examination, counsel stated that he did not recall the petitioner mentioning that she was taking medication on the day she pled guilty.

The petitioner testified that she was thirty-five years old and had mental health issues since the age of fourteen. She explained that she had tried to commit suicide on a number of occasions and had been hospitalized seven or eight times due to those attempts or to overdosing on drugs. The petitioner testified that she had been in drug rehabilitation one or two times. The petitioner recalled that she tried to commit suicide a couple of weeks before the murder in this case. She stayed in the hospital for two days and then saw her regular psychiatrist, Dr. Fakhruddin, when she got out. The petitioner recounted that Dr. Fakhruddin used medications as part of her treatment, and she now realized that the medications affected her ability to think clearly.

The petitioner recalled that she received mental health treatment at Tennessee Christian Medical Center, Dede Wallace Center, Summit Medical Hospital, Meharry General Hospital, the Mental Health Co-op, and MTMHI. The petitioner testified that she was sure she told counsel about all the places she had received mental health treatment, but counsel only told her about speaking to someone at Tennessee Christian Medical Center and Dr. Fakhruddin and never mentioned meeting with anyone in person.

Although she could not remember exactly, the petitioner thought she was on Zyprexa, Trileptal, Klonopin, Xanax, Hydrocodone, Neurontin, and an anti-seizure drug on the day of the murder. When asked to recall the day of the murder, the petitioner stated,

I remember laying down in bed. I had gotten . . . into it with an uncle of mine earlier that night over a dispute about money And he owed me money. And he didn't want to pay it. I had taken some Klonopins to calm down, you know. And I went in my room and laid down. The electricity went off. I got up, went outside. I remember I went to [the victim's] front door. And I was talking to a guy over across the street And [the victim] came to the door and said her cordless phone was out, too, or whatever, because that was all I had, was a cordless phone. So I was going back. And as I was going back through the backyard, she came to her back door and called me and said I got the plug-up phone. So I went in there. And I remember sitting there. I was in the chair and she was [on] the couch. And we were talking. She was telling me something about she'd just gotten back from Hawaii. And I was trying to call [the electric company]. And the next thing I remember, you know, I'm standing there with a bloody knife. That's, basically, the gist of it.

The petitioner said that she never saw any of the discovery in the case, even though she told counsel she would like to see it. According to the petitioner, counsel told her that the "boxes and boxes" of discovery were too horrible for her to see. The petitioner remembered that when she was getting evaluated at Vanderbilt, counsel told someone that her case was potentially a death penalty

case. She stated that counsel had made it clear to her that there was a possibility she could receive the death penalty and that weighed very heavily in her decision to plead guilty.

The petitioner recalled that on the day she pled guilty she was on some psychotropic medications, and she was scared and “just wanted to get it over with.” The petitioner admitted that she probably told the trial court that she was pleading guilty voluntarily, and that counsel told the trial court that the petitioner understood what she was doing. The petitioner testified that she did not tell counsel that she was on medication the day she pled guilty, but she had mentioned something about medication one time when he visited her in jail. She said that the medication affected her ability to make a decision the day she pled, and she would have made a different decision knowing what she knows now.

On cross-examination, the petitioner testified that she was no longer taking any psychotropic drugs because she did not trust that type of medication anymore. She said that not using illegal drugs has made her mental condition “not so bad,” because her use of illegal drugs compounded her mental health problems. The petitioner admitted that she still had not seen the discovery materials and did not know if they would have affected her decision to plead guilty. She stated that she never expected to be found not guilty; she just felt that her punishment was harsh given her mental state. The petitioner thought that she had “diminished capacity” at the time of the murder, but she did not have a doctor to testify to that effect.

The petitioner recalled that the night of the murder, she had a knife and a pack of cigarettes when she walked to the victim’s house. She claimed that the reason she had a knife was because of activities that had been going on in the neighborhood. The petitioner did not recall telling a detective that the victim kept complaining about how she felt and she wanted to put her out of her misery. The petitioner said that she did not deny saying it; she just did not remember saying it. The petitioner remembered that the victim’s keys were in the victim’s purse that she took. The petitioner stated that the main reason she pled guilty was because she was under the impression that the death penalty was a real possibility.

After the hearing, the post-conviction court entered an order denying the petitioner’s request for relief. On appeal, the petitioner argues that the post-conviction court erred in denying her petition because she received the ineffective assistance of counsel which caused her to enter an unknowing and involuntary plea.

STANDARD OF REVIEW

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in her petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court’s findings unless the petitioner shows that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court’s factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo

with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

ANALYSIS

In order to establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A fair assessment of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 697; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Strickland*, 466 U.S. at 697.

When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must show a reasonable probability that, but for the errors of his counsel, he would not have pled guilty. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Adkins v. State*, 911 S.W.2d 334, 349 (Tenn. Crim. App. 1994). When determining the knowing and voluntary nature of the guilty plea, the standard is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *see also State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999).

The petitioner first argues that counsel was ineffective for failing to properly investigate her extensive mental health history. In this regard, the post-conviction court held:

The Court finds that [counsel] was aware of Petitioner's mental health history, including the different institutions she had been admitted to leading up to the crime. The Court finds that [counsel] was similarly aware of Petitioner's suicide attempt. The Court finds that [counsel] adequately researched Petitioner's medical history, including extensive telephone conversations with Petitioner's most recent treating psychiatrist. The Court finds that [counsel] asked to have Petitioner evaluated and she was deemed competent. The Court finds that [counsel] effectively explained

how Petitioner's mental health may affect the outcome of the case, and of the unavailability of an insanity plea.

The record supports the post-conviction court's findings that counsel adequately investigated the petitioner's mental health history. Counsel testified that he gathered as many of the petitioner's medical records as he could, including records from three facilities and a mental evaluation conducted at Vanderbilt. Counsel also testified that he spoke to Dr. Fakhruddin, the petitioner's treating psychiatrist, and received records from him. Thus, the record reveals no deficiency in counsel's investigation of the petitioner's mental health history.

The petitioner argues that counsel was ineffective in failing to provide her with the discovery in her case. The post-conviction court concluded that counsel "did not refuse to show Petitioner the discovery materials. The Court finds that [counsel] believed that he and Petitioner viewed the same evidence in preparation for her defense." At the evidentiary hearing, counsel testified that he did not recall telling the petitioner that there were boxes and boxes of discovery. Counsel stated that although he could not remember exactly when he showed the petitioner the discovery, he thought he showed it to her when it was received. The post-conviction court was in the best position to assess the credibility of the witnesses, and the court determined that "[the p]etitioner was not denied an opportunity to view the evidence against her." The record does not preponderate against this finding.

The petitioner argues that counsel was ineffective for advising her that she could get the death penalty. In this regard, the post-conviction court stated:

The Court finds that Petitioner was concerned about the possibility of receiving a death sentence and sought a plea agreement that would prevent Petitioner from having to defend her life at trial. The Court finds that the State did not give notice of intent to seek the death penalty, but was of the opinion that a death sentence would be appropriate in Petitioner's case and that [counsel] effectively communicated this information to her. The Court finds that Petitioner was aware that, had she not pleaded guilty, the State would still have had the opportunity to file a notice of intent to seek the death penalty. The Court finds that [counsel's] advocacy was a catalyst in securing the plea offer by the State. The Court is of the opinion that [counsel] did not refuse to try Petitioner's case. The Court is also of the opinion that [counsel] did not guarantee that Petitioner would receive a death sentence if she proceeded with a trial.

At the hearing, counsel testified that the state indicated that the petitioner's case was a potential death penalty case, and he told the petitioner that a felony murder conviction could carry a sentence of life, life without parole, or the death penalty. Counsel said that he asked the state to delay the decision on the death penalty until he could receive information on the petitioner's mental health. Counsel stated that he did not feel that the petitioner had a chance of being found not guilty based on the evidence and the law, and he felt that she understood everything. Counsel said that he

did not tell the petitioner that the state had filed an intent to seek the death penalty because it had not, but he did tell her that the state had mentioned that the death penalty was a possibility. The record reveals no deficiency in counsel's advice to the petitioner concerning the death penalty.

As a corollary to her ineffective assistance claim, the petitioner suggests that counsel's above mentioned deficiencies caused her to enter an unknowing and involuntary plea. We first note that the petitioner failed to include a transcript of the guilty plea hearing in the record for our review. It is the petitioner's duty to ensure that a correct and complete record is before this court, or the issues raised may be considered waived. *See Thompson v. State*, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997). In any event, the record shows that the petitioner was found competent to stand trial, there was substantial evidence against the petitioner, counsel advised the petitioner of the law and the possible penalties she faced, and the petitioner avoided facing a greater penalty by pleading guilty. The petitioner has failed to prove that her plea of guilty was anything but a voluntary and intelligent choice among the alternatives.

CONCLUSION

After review, we conclude that the petitioner has failed to prove that the evidence preponderates against the findings of the trial court in regard to any of her allegations. Therefore, we affirm the denial of post-conviction relief.

J.C. McLIN, JUDGE